CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent has stated that he knowingly does not challenge or contest the truth of the allegations against him that he mishandled funds held in his law firm's trust account and that he took steps to conceal his actions. The court accepts respondent's surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with all terms of Neb. Ct. R. § 3-316 of the disciplinary rules, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGEMENT OF DISBARMENT.

STATE OF NEBRASKA, APPELLEE, V.
DARREN J . DRAHOTA, APPELLANT.
788 N.W.2d 796

Filed September 24, 2010. No. S-08-628.

1. **Constitutional Law: Criminal Law.** Whether speech that leads to a criminal conviction is protected by the First Amendment is a question of law.
2. ____: ____. The First Amendment limits a state's ability to prosecute certain criminal offenses.
3. **Constitutional Law.** The First Amendment protects wide swaths of speech, but its protections are not absolute.
4. **Constitutional Law: Libel and Slander: Obscenity: Criminal Law.** The First Amendment does not apply to libel, obscenity, incitements to imminent lawlessness, true threats, and fighting words.
5. **Constitutional Law: Disturbing the Peace.** A state may constitutionally regulate epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.
6. ____: ____. To fall within the First Amendment exception for fighting words, speech must be shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

7. **Constitutional Law.** Words must do more than offend, cause indignation, or anger the addressee to lose the protection of the First Amendment.
8. **Constitutional Law: Criminal Law: Statutes.** The State cannot constitutionally criminalize speech under Neb. Rev. Stat. § 28-1322 (Reissue 2008) solely because it inflicts emotional injury, annoys, offends, or angers another person.
9. **Constitutional Law.** In determining whether "fighting words" are unprotected speech under the First Amendment, it is the tendency or likelihood of the words to provoke violent reaction that is the touchstone of the test under *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942), and both the content and the context of the speech are relevant considerations to that determination.
10. **Constitutional Law: Disturbing the Peace.** Even when criticisms of public figures are outrageous, if they fall short of provoking an immediate breach of the peace, they are protected by the First Amendment.
11. **Constitutional Law.** The First Amendment affords the broadest protection to political expression in order to assure the unfettered interchange of ideas for bringing about political and social changes desired by the people.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and SIEVERS and CASSEL, Judges, on appeal thereto from the District Court for Lancaster County, JOHN A. COLBORN, Judge, on appeal thereto from the County Court for Lancaster County, GALE POKORNY, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Eugene Volokh, of Mayer Brown, L.L.P., and Gene Summerlin, of Ogborn, Summerlin & Ogborn, P.C., for appellant.

Darren J. Drahota, pro se.

Jon Bruning, Attorney General, and George R. Love for appellee.

G. Michael Fenner and Amy A. Miller for amicus curiae American Civil Liberties Union Foundation of Nebraska.

Bruce Adelstein, of Law Office of Bruce Adelstein, for amici curiae current and former elected officials.

William Creeley and Azhar Majeed for amicus curiae Foundation for Individual Rights in Education.

David G. Post, of Beasley School of Law, Temple University, for amici curiae law professors.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

SUMMARY

The State convicted the appellant, Darren J. Drahota, of a breach of the peace based on two e-mails he sent to William Avery, his former political science professor and a candidate for the State Legislature. The e-mails—laced with provocative and insulting rhetoric and with the Iraq war as a background—suggested that Avery was a traitor and that he sympathized with Al Qaeda, a terrorist organization.

We are asked to decide whether Drahota's e-mails were protected speech under the First Amendment. The Court of Appeals determined that the First Amendment did not protect Drahota's speech because the e-mails were "fighting words," an exception to free speech protection.[1] We disagree. Drahota's rants, although provocative and insulting, were not fighting words. We reverse, and remand because the First Amendment protects Drahota's speech.

BACKGROUND

In January 2006, Drahota began an e-mail correspondence with Avery, who was then a political science professor at the University of Nebraska. Drahota sent the e-mails to Avery's university-issued e-mail account. Although the correspondence between the two consisted of 20 e-mails, we emphasize that the State convicted Drahota only on the last two e-mails. But we discuss the previous e-mails to put the last two in context.

It is clear from the record that Drahota and Avery shared a passion for politics. At the time, Avery was running for the Nebraska Legislature, and he is now a member of that body. The first 18 e-mails between the two dealt with current issues in politics, including the war on terrorism, the Bush presidency, and the Clinton impeachment. Drahota's tone was provocative and confrontational. For example, Drahota asserted, among other things, that those who support liberal causes

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[1] *State v. Drahota*, 17 Neb. App. 678, 772 N.W.2d 96 (2009).

have a mental disease and that liberals desire the destruction of America.

In early February 2006, the exchange came to a head. Drahota sent Avery a lengthy e-mail suggesting that indiscriminately massacring those living in the Middle East would save American lives after first suggesting that Democrats, including Avery, were full of hate. Avery responded:

> I am tired of this shit. You have accused me of being anti-American, unpatriotic, and having a mental disorder, among other things. I find this offensive and I will not engage in anymore of this with you. I served my country in uniform honorably for four years. How many have you served? Since you are so pure, so pro-American, so absolutely correct, and wonderfully patriotic, I suggest you sign-up for duty in Iraq right away and put all your claims to the test. But, of course, you will not do that. You, Michael Savage, and the "Chicken Hawks" in the Bush Administration don't have the guts!!

Drahota responded:

> Fuck you! You don't know me one bit. You are a liberal American coward. If it were up to you, you would imprison Bush before bin Laden because you have such a fascination with it. I am tired of your brainwashing students who are in the process of molding their minds. I spent 18 months in Pensacola Florida before I was honorably discharged for a neck injury. You can go fuck yourself if you are going to get that way. I'd kick your ass had you said that right in front of me, but YOU don't have the guts to say that. If you think you do, just try me. You have done nothing for this country, but bad things in recent years. Once again, if you have the courage to say that to my face, I'll let you do it, but don't you EVER talk anything about the military with me. We call you people turncoats and I'll be dammed if I'm going to take that kind of disrespect from someone who is so clueless as to my military background. As long as we're on the topic, how many years did your hero Clinton serve? You contradict yourself so much that I want to puke. Your website is

> also a farce. You lie so much and don't show the true you. I guess, you're a politician.
>
> You've really pissed me off[.]

Drahota later sent Avery an apology. Avery, unmoved by the apology, asked Drahota not to contact him again. He warned Drahota that he would contact the police if he received anything else of that nature.

Four months later, in June 2006, Avery received two anonymous e-mails from the address "averylovesalqueda@yahoo.com." The State convicted Drahota based on these e-mails. The subject line of the first e-mail was "Al-Zarqawi's dead. . . ." The e-mail read:

> Does that make you sad that the al-queda leader in Iraq will not be around to behead people and undermine our efforts in Iraq? I would guess that a joyous day for you would be Iran getting nukes? You, Michael Moore, Ted Kennedy, John Murtha, and the ACLU should have a token funeral to say goodbye to a dear friend of your anti-american sentiments.

Two days later, Avery received a second e-mail from the same address. The subject line was "traitor." It read:

> I have a friend in Iraq that I told all about you and he referred to you as a Benedict Arnold. I told him that fit you very well. GO ACLU!!!!!!!!!!!!!!! GO MICHAEL MOORE, GO JOHN MURTHA!!!!!!!!!!!! By the way, I am assuming you are a big fan of Murtha's, and anti-marine like him, but being a big liberal, don't you support those Marines that are being jailed without charges at Camp Pendleton. Oh, I forgot, they are not Al Queda members so you and the ACLU will not rush to their defense. I'd like to puke all over you. People like you should be forced out of this country. Hey, I have a great idea!!!!!!!!!!!!!!!!!! Let's do nothing to Iran, let them get nukes, and then let them bomb U.S. cities and after that, we will just keep turning the other cheek. Remember that Libs like yourself are the lowest form of life on this planet[.]

After receiving these e-mails, Avery contacted the Lincoln Police Department. The police traced the e-mails to a computer owned by a woman with whom Drahota was living. When contacted by the police, Drahota admitted sending the e-mails.

The State charged Drahota in Lancaster County Court with disturbing the peace.[2] After a bench trial, the court found him guilty and fined him $250. After an unsuccessful appeal to the district court, Drahota appealed to the Court of Appeals.

In rejecting Drahota's First Amendment challenge and affirming his conviction, the Court of Appeals determined that Drahota's speech constituted unprotected "fighting words." We granted Drahota's petition for further review.

ASSIGNMENTS OF ERROR

Drahota asserts that the Court of Appeals erred in finding (1) that his e-mails constituted a breach of the peace and (2) that they were not protected by the First Amendment.

STANDARD OF REVIEW

[1] Whether speech that leads to a criminal conviction is protected by the First Amendment is a question of law.[3]

ANALYSIS

[2] Drahota argues that the First Amendment protects his e-mails. The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech . . . ."[4] The First Amendment limits the state's ability to prosecute certain criminal offenses.[5]

[3,4] The First Amendment protects wide swaths of speech, but its protections are not absolute.[6] Historically, the Supreme

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[2] Neb. Rev. Stat. § 28-1322 (Reissue 2008).

[3] See *State v. McKee*, 253 Neb. 100, 568 N.W.2d 559 (1997).

[4] U.S. Const. amend. I.

[5] See, e.g., *U.S. v. Popa*, 187 F.3d 672 (D.C. Cir. 1999); *Tollett v. United States*, 485 F.2d 1087 (8th Cir. 1973); *McKee, supra* note 3; *State v. Suhn*, 759 N.W.2d 546 (S.D. 2008); *State v. Fratzke*, 446 N.W.2d 781 (Iowa 1989).

[6] *Virginia v. Black*, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).

Court has held that the First Amendment does not to apply to certain categories of speech. These categorical exceptions include libel,[7] obscenity,[8] incitements to imminent lawlessness,[9] true threats,[10] and fighting words.[11] As noted, the Court of Appeals determined that the First Amendment did not protect Drahota's speech because it fell within the exception for fighting words.

Offensive Speech Does Not Lose Its Constitutional Protection

In concluding that Drahota's speech constituted fighting words, the Court of Appeals relied on our decision in *State v. Broadstone*.[12] In *Broadstone*, we affirmed the defendant's breach of the peace conviction under the fighting words exception to First Amendment protection. We quoted the U.S. Supreme Court's decision in *Chaplinsky v. New Hampshire*[13] to explain that fighting words are unprotected speech:

> "'[F]ighting' words [are] those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the

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[7] *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

[8] *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).

[9] *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969).

[10] *Black, supra* note 6; *Watts v. United States*, 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969).

[11] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942).

[12] *State v. Broadstone*, 233 Neb. 595, 447 N.W.2d 30 (1989).

[13] *Chaplinsky, supra* note 11.

> Constitution, and its punishment as a criminal act would raise no question under that instrument.'. . ."[14]

Within this quote from *Chaplinsky*, there are two descriptions of fighting words. The first refers to words whose "'very utterance inflict[s] injury.'" The other refers to words which "'tend to incite an immediate breach of the peace.'"

[5] But in *Chaplinsky*, the state court had construed the statute—which prohibited speaking offensive words to a person in a public place—to apply only to speech likely to provoke retaliation. So although the Supreme Court defined fighting words in the alternative, it only upheld the statute's constitutionality as limited by the state court.[15] Specifically, the Court held that a state may constitutionally regulate epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.[16]

We recognize that some of our statements in *Broadstone* could be read to permit a broader application of the fighting words exception. But we decline to interpret our holding broadly because the Supreme Court has largely abandoned *Chaplinsky*'s "inflict injury" standard.

The Seventh Circuit has recently summarized the case law and legal commentary on this issue:

> In later cases, the Court has either dropped the "inflict-injury" alternative altogether or simply recited the full *Chaplinsky* definition without further reference to any distinction between merely hurtful speech and speech that tends to provoke an immediate breach of the peace. . . .
>
> Although the "inflict-injury" alternative in *Chaplinsky*'s definition of fighting words has never been expressly overruled, the Supreme Court has never held that the government may, consistent with the First Amendment, regulate or punish speech that causes emotional injury but does *not* have a tendency to provoke an immediate breach of the peace. . . . The justification for "plac[ing] fighting

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[14] *Broadstone, supra* note 12, 233 Neb. at 600, 447 N.W.2d at 34.

[15] See *Purtell v. Mason*, 527 F.3d 615 (7th Cir. 2008).

[16] *Chaplinsky, supra* note 11.

> words outside the protection of the First Amendment" is not their capacity to inflict emotional injury—many words do that—but their tendency "to provoke a violent reaction and hence a breach of the peace."[17]

[6] In fact, it was only 7 years after *Chaplinsky* that the Court began to retreat from the "inflict injury" part of the definition. In *Terminiello v. Chicago*,[18] the Court stated that a conviction could not rest on the grounds that the speech merely "stirred people to anger, invited public dispute, or brought about a condition of unrest." To fall within the First Amendment exception for fighting words, speech must be "shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[19]

[7] Similarly, in *Gooding v. Wilson*,[20] the Court held that a breach of the peace statute was overbroad because it was not limited to fighting words. The Court reasoned that because the statute could be applied "to utterances where there was no likelihood that the person addressed would make an immediate violent response, it is clear that [the statute is not limited] to 'fighting' words defined by *Chaplinsky*."[21] In effect, the *Gooding* Court read the "inflict injury" prong out of the definition. Lower courts have followed the Supreme Court's lead.[22] "It is now clear that words must do more than offend, cause indignation or anger the addressee to lose the protection of the First Amendment."[23]

[8] We agree. We hold that the State cannot constitutionally criminalize speech under § 28-1322 solely because it inflicts

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[17] *Purtell, supra* note 15, 527 F.3d at 623-24.

[18] *Terminiello v. Chicago*, 337 U.S. 1, 5, 69 S. Ct. 894, 93 L. Ed. 1131 (1949).

[19] *Id.*, 337 U.S. at 4.

[20] *Gooding v. Wilson*, 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972).

[21] *Id.*, 405 U.S. at 528.

[22] See, e.g., *Purtell, supra* note 15. See, also, *Brooks v. N.C. Dept. of Correction*, 984 F. Supp. 940 (E.D.N.C. 1997).

[23] *Hammond v. Adkisson*, 536 F.2d 237, 239 (8th Cir. 1976).

emotional injury, annoys, offends, or angers another person. Accordingly, we cannot affirm Drahota's conviction merely because Avery found it offensive.

Drahota's Speech Was Not Likely to Provoke an Immediate Breach of the Peace

The U.S. Supreme Court in *Chaplinsky* held that a state could regulate speech that tends to incite an immediate breach of the peace. Although the Supreme Court has not upheld such a conviction since *Chaplinsky*,[24] other courts, including this court, have done so.[25] In upholding such convictions, we have stressed that the right to use abusive epithets of "'slight social value'" is outweighed by the State's strong "'interest in order.'"[26]

[9] Indeed, "[i]t is the *tendency* or *likelihood* of the words to provoke violent reaction that is the touchstone of the *Chaplinsky* test . . . ."[27] And both the content and the context of the speech are relevant considerations to that determination.[28]

As noted, we upheld a disturbing the peace conviction in *Broadstone*. But we do not believe the facts in *Broadstone* support the Court of Appeals' conclusion that Drahota's speech constituted fighting words. In *Broadstone*, the defendant was standing outside an elementary school, shouting obscenities in the presence of children who were leaving school. A man waiting for his daughter crossed the street and asked him what he was doing. The defendant replied that it was none of his

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[24] Note, *The Demise of the* Chaplinsky *Fighting Words Doctrine: An Argument for Its Interment*, 106 Harv. L. Rev. 1129 (1993).

[25] E.g., *Broadstone, supra* note 12; *State v. Robinson*, 319 Mont. 82, 82 P.3d 27 (2003); *State v. Szymkiewicz*, 237 Conn. 613, 678 A.2d 473 (1996); *In re Alejandro G.*, 37 Cal. App. 4th 44, 43 Cal. Rptr. 2d 471 (1995); *State v. Creasy*, 885 S.W.2d 829 (Tenn. Crim. App. 1994).

[26] *Broadstone, supra* note 12, 233 Neb. at 600, 447 N.W.2d at 34, quoting *Chaplinsky, supra* note 11.

[27] *Lamar v. Banks*, 684 F.2d 714, 718 (11th Cir. 1982).

[28] See, *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978); *Hess v. Indiana*, 414 U.S. 105, 94 S. Ct. 326, 38 L. Ed. 2d 303 (1973).

"'fucking business'"[29] and then began shaking a stick in the man's direction. The defendant continued to yell obscenities. The man then pushed the defendant against a fence and apparently held him there. After he was released, the defendant ran away, yelling back to the man, "'Your wife is a whore. Your daughter is a whore. Your whole family's a whore. I fucked her last night.'"[30] We upheld the defendant's conviction. We determined that it fell within the definition of fighting words in *Chaplinsky*. We did not parse the definition to determine whether the defendant's words were fighting words because they inflicted injury or because they were likely to incite an immediate breach of the peace. But the facts showed that the defendant's words were not only the type likely to provoke an immediate retaliation, but in fact did so.

We conclude that Drahota's e-mails are not fighting words and are distinguishable from *Broadstone*. The context of Drahota's speech was an ongoing political debate, not random obscenities directed at small children, which could likely provoke a response from nearby adults. Here, Drahota and Avery had corresponded for months on political issues. And both had made provocative statements during that dialog without incident. The First Amendment encourages robust political debate, particularly the right to criticize public officials and measures:

> At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. "[T]he freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." . . . We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions.[31]

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[29] *Broadstone, supra* note 12, 233 Neb. at 598, 447 N.W.2d at 32.

[30] *Id.* at 598, 447 N.W.2d at 33.

[31] *Hustler Magazine v. Falwell*, 485 U.S. 46, 50-51, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988) (citation omitted).

[10] By the time Drahota sent the e-mails at issue, Avery was running for office. And we have stated that "[t]he steadfast rule is that '"in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment."'"[32] So even when criticisms of public figures are outrageous, if they fall short of provoking an immediate breach of the peace, they are protected by the First Amendment. To hold otherwise would obstruct the free exchange of ideas.

Yet, we do not hold that political speech can never constitute fighting words. It is not difficult to imagine insults virulent enough to provoke a breach of the peace in a political debate. But here, even if a fact finder could conclude that in a face-to-face confrontation, Drahota's speech would have provoked an immediate retaliation, Avery could not have immediately retaliated. Avery did not know who sent the e-mails, let alone where to find the author. We conclude that the State has failed to show that Drahota's political speech constituted fighting words.

The State's Other Arguments

At oral argument, the State put forward two other arguments for affirming the conviction. First, it argues that under the U.S. Supreme Court's decision *Rowan v. Post Office Dept.*,[33] Avery had a right to be let alone after he asked Drahota to stop e-mailing him. Second, it argues that Drahota was being prosecuted not on the content of his speech, but instead for the conduct of speaking at all.

We note that because the State omitted these arguments from its briefs and raised them for the first time at oral argument, we are under no duty to consider them.[34] But the district court's

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[32] *McKee, supra* note 3, 253 Neb. at 106, 568 N.W.2d at 564, quoting *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994).

[33] *Rowan v. Post Office Dept.*, 397 U.S. 728, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970).

[34] See *State v. Duncan*, 278 Neb. 1006, 775 N.W.2d 922 (2009).

order could be read as applying this reasoning, so we address them. We do not, however, view these arguments as substantively different. Both arguments depend upon the State's claim that after Avery had asked Drahota to quit sending further e-mails, Drahota's act of sending the e-mails—regardless of the content—constituted a breach of the peace.

The State relies on *Rowan v. Post Office Dept.*[35] *Rowan* involved a federal statute that allowed a homeowner to request that a vendor remove his name from the mailing list and stop all future mailings if the homeowner found the mailings erotically arousing or sexually provocative. After weighing a person's "right . . . 'to be let alone' [against] the right of others to communicate,"[36] the Court ruled that a vendor has no right to send unwanted material to the home of another.[37] Crucial to the Court's holding was the absoluteness and finality of the homeowner's decision; the government had no role in determining whether the materials were objectionable.

We find *Rowan* distinguishable. First, we note the absence of a statute like the one in *Rowan*. The statute in *Rowan* gave the homeowner absolute and final discretion over what was objectionable. Under the statute, the government merely enforced the homeowner's preference and had no part in deciding what was objectionable. In the present case, the discretion is left to the prosecutor whether to charge Drahota with breach of the peace. This element of government action undermines the State's *Rowan*-based argument.

[11] Because the State is an actor here, our concern is not focused on balancing Avery's right to be let alone against Drahota's right to communicate. But even if it were, the scales would tip in Drahota's favor. First, *Rowan* dealt with commercial speech aimed at private citizens. In contrast, this case deals with political speech directed at a candidate for public office. Second, the discussion of political issues is not the equivalent of mass advertisements in balancing free speech against

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[35] *Rowan, supra* note 33.

[36] *Id.*, 397 U.S. at 736.

[37] *Rowan, supra* note 33.

privacy. "'The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." . . .'"[38] The ability of a constituent to voice his concerns and opinions to his elected representatives, and to those who wish to become his representatives, is the cornerstone of republican government. We reject the State's contention that Drahota's mere sending of an e-mail constituted a breach of the peace because Avery had previously asked Drahota not to communicate again.

But that does not mean a person's right to speak will always trump another's right to be let alone. While Avery, as a political candidate, had diminished privacy rights trumped by a potential constituent's First Amendment rights, we recognize that balancing free speech rights against the privacy rights of a private citizen may yield a different result.

Obviously, Drahota is not a wordsmith, and his bumper sticker rhetoric was certainly provocative. But it did not rise to the level of fighting words under these facts. If the First Amendment protects anything, it protects political speech and the right to disagree.

Here, Drahota and Avery had an ongoing, bareknuckle political dialog that germinated in a political science course at the University of Nebraska. Avery, to his credit, permitted the university forum to be a marketplace for the free flow of ideas. But Drahota stopped their dialog upon Avery's request and did not e-mail Avery again until Avery was running for political office.

In closing, the hallmark of free speech protection is to allow the "'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting."[39] To criminalize Drahota's speech would impede the free flow

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[38] *State ex rel. Stenberg v. Moore*, 258 Neb. 738, 743, 605 N.W.2d 440, 444 (2000), quoting *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

[39] *Black, supra* note 6, 538 U.S. at 358, quoting *Abrams v. United States*, 250 U.S. 616, 40 S. Ct. 17, 63 L. Ed. 1173 (1919).

of those ideas and political discussion between the people and their representatives. This we refuse to do.

CONCLUSION

We conclude that the State cannot criminalize speech under the fighting words exception solely because it inflicts emotional injury, annoys, offends, or angers another person. And we reject the State's argument that the First Amendment does not protect Drahota's speech because it constituted an invasion of Avery's privacy. The State does not contend that any other exception applies. Because no exception applies, the First Amendment protects Drahota's speech. We reverse his conviction and remand the cause to the Court of Appeals with directions to the district court for further remand to the county court for dismissal.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLANT, V.
LUCAS J. PETERSON, APPELLEE.
788 N.W.2d 560

Filed September 24, 2010. No. S-09-462.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **Criminal Law: Contracts.** A cooperation agreement is neither a plea agreement nor a grant of immunity but arises when the State agrees to limit the prosecution in some manner in consideration for the defendant's cooperation.
3. ____: ____. Cooperation agreements are contractual in nature and subject to contract law standards.
4. **Criminal Law: Contracts: Due Process.** The basis for enforcing a cooperation agreement is the Due Process Clause of the 14th Amendment.
5. **Contracts.** Ambiguity exists in a document when a word, phrase, or provision in the document has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
6. **Criminal Law: Contracts.** The language in a cooperation agreement is to be read as a whole and given a reasonable interpretation, not an interpretation that would produce absurd results.
7. **Criminal Law: Contracts: Proof.** Once a cooperation agreement is shown to exist, the State has the burden to show that the defendant did not perform his or her part of the agreement.